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# Supreme Court of the United States

OCTOBER TERM, 1955

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## No. 643

PAUL DEEMER JOHNSTON, Petitioner

v.

UNITED STATES OF AMERICA

---

## No.

JOHN SOKOL, Petitioner

v.

UNITED STATES OF AMERICA

---

**Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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# INDEX

## Subject Index


| | PAGE |
|---|---|
| Joint petition for writ of certiorari | 1 |
| Opinions below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes and regulations involved | 3 |
| Statement of the cases | 3 |
| Reasons for granting the writ | 4 |
| Conclusion | 17 |
| Appendix A—Opinion of Court of Appeals | 18 |
| Appendix B—Opinion of District Court | 25 |
| Appendix C—Judgments of Court of Appeals | 28 |
| Appendix D—Order denying joint petition for rehearing | 30 |
| Appendix E—Selective Service material | 31 |
| Section 6 (j) of the Act | 31 |
| Section 12 (a) of the Act | 33 |
| Section 1660.1 of the Regulations | 33 |
| Section 1660.20 of the Regulations | 34 |
| Section 1660.30 of the Regulations | 36 |
| Section 1660.31 of the Regulations | 36 |
| Appendix F—Opinion of United States Court of Appeals for the Tenth Circuit in *United States* v. *Patteson*, January 19, 1956 | 39 |


## Cases Cited


| | |
|---|---|
| Billings v. Truesdell 321 U. S. 542 (1944) | 5 |
| Dodez v. United States 329 U. S. 338 (1946) | 7, 9, 16, 17 |
| Estep v. United States 327 U. S. 114 (1946) | 5 |

CASES CITED *continued*


| | PAGE |
|---|---|
| Falbo v. United States 320 U. S. 549 (1944) | 5 |
| Gibson v. United States 329 U. S. 338 (1946) | 7, 8, 9, 17 |
| Jeffries v. United States 10th Cir., 169 F. 2d 86 | 7, 9 |
| New York Central & H. R. R. Co. v. United States 2d Cir., 166 F. 267 (1908) | 12 |
| Regina v. Milner 2 Car. & K. 309, 175 Eng. Rep. 128 (1846) | 12 |
| State v. Peabody 25 R. I. 544, 560, 56 A. 1028 (1904) | 11 |
| State v. Yocum 182 Ind. 478, 106 N. E. 705 (1914) | 11 |
| United States v. Anderson 328 U. S. 699, 705 (1946) | 12 |
| United States v. Chiarito D. Or., 69 F. Supp. 317, 321-325 (1946) | 5, 13 |
| United States v. Johnson 323 U. S. 273, 276, 279 (1944) | 15, 16 |
| United States v. Johnston and Sokol E. D. Pa., 131 F. Supp. 955 (1955) | 2, 5 |
| United States v. Patteson D. Kans., No. 9391, May 16, 1955, affirmed, 10th Cir., No. 5193, January 19, 1956 | 5, 39 |
| United States v. Sutter S. D. Cal., 127 F. Supp. 109 (1954) | 5 |
| United States v. Van Den Berg 7th Cir., 139 F. 2d 654 (1944) | 12 |

## Other Authorities Cited


| | PAGE |
|---|---|
| Federal Rules of Criminal Procedure, Rules 37 (b) (2) and 45 (a) | 2 |
| Regulations, Selective Service (32 C. F. R. § 1602, *et seq.*) | |
| Section 1632.9 | 16 |
| Section 1660.1 | 3, 6, 33 |
| Section 1660.20 | 6, 34 |
| Section 1660.20 (a) | 6, 34 |
| Section 1660.20 (b) | 6, 34 |
| Section 1660.20 (c) | 6, 35 |
| Section 1660.20 (d) | 6, 35 |
| Section 1660.21 (a) | 6 |
| Section 1660.30 | 3, 36 |
| Section 1660.31 | 3, 36 |
| Section 1660.31 (a) | 7, 36 |
| "Selective Service," National Headquarters, Selective Service System, Washington, D. C., Jan. 1956, Vol. VI, No. 1 | 4 |
| 18 U. S. C. A. §§ 420 (f)-(h) (Federal Denture Act) | 15 |
| 18 U. S. C. § 3231 | 2 |
| 28 U. S. C. § 1254 (1) | 2 |
| 50 U. S. C. App. §§ 301-318 (Selective Training and Service Act of 1940) | 9, 13 |
| 50 U. S. C. App. §§ 451-470 (Universal Military Training and Service Act) | |
| Section 6 (j) | 3, 31 |
| Section 12 (a) | 3, 4, 5 |
| United States Constitution, Amendment VI | 2, 11, 13, 17 |

# Supreme Court of the United States

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## No.

**PAUL DEEMER JOHNSTON, Petitioner**

**v.**

**UNITED STATES OF AMERICA**

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## No.

**JOHN SOKOL, Petitioner**

**v.**

**UNITED STATES OF AMERICA**

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## Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the indictment returned against

each petitioner, charging a violation of the Universal Military Training and Service Act, because the offense in each case was not committed in the district and, therefore, the court did not have jurisdiction.

## OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition. The opinion of the District Court is reported (131 F. Supp. 955 (E. D. Pa. 1955)). It is printed as Appendix B to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1955. (See Appendix C to this petition, pages 28-29, *infra.*) A petition for rehearing was filed and denied on January 4, 1956. (See Appendix D to this petition, page 30, *infra.*) The time for filing this petition for writ of certiorari expires February 3, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

## QUESTION PRESENTED

Where each petitioner resided in the Western District of Pennsylvania, the Selective Service local board of each was located in the Western District of Pennsylvania, the orders to perform work were issued in the Western District of Pennsylvania and each petitioner did not go beyond his local board in the Western District of Pennsylvania and at all times refused to leave the Western District of Pennsylvania and did not proceed to the Eastern District of Pennsylvania, were the offenses committed in the Western District of Pennsylvania and not in the Eastern District and, therefore, does it violate rights guaranteed by the Sixth Amendment to the Constitution to indict and

prosecute each petitioner in the Eastern District of Pennsylvania?

## STATUTES AND REGULATIONS INVOLVED

Section 12 (a) of the Universal Military Training and Service Act (50 U. S. C. App. § 462 (a)) is involved. Also Section 6 (j) of the Act must be considered (50 U. S. C. App. § 456 (j)).

Sections 1660.1, 1660.20, 1660.30 and 1660.31 of the Regulations (32 C. F. R. §§ 1660.1, 1660.20, 1660.30 and 1660.31) are involved. These are extensive provisions which are printed as Appendix E, *infra*, page 31.

## STATEMENT OF THE CASES

Petitioners were indicted for failure to comply with orders of their local boards directing them to report to state hospitals in the Eastern District of Pennsylvania to do civilian work contributing to the maintenance of the national health, safety and interest. Petitioners did not report to the state hospitals in the Eastern District of Pennsylvania. They did not leave the Western District of Pennsylvania. In that federal judicial district they refused to leave the district and proceed to the state hospitals located in the Eastern District of Pennsylvania. Each petitioner did not go beyond his local board located in the Western District of Pennsylvania, in defiance of the order of that board, issued in the Western District of Pennsylvania.

At all times petitioners refused to leave the Western District of Pennsylvania and never, at any time, reported to the state hospitals in the Eastern District of Pennsylvania to perform the work in compliance with the orders of the local boards. The facts are adequately and sufficiently stated in the opinion of the Court of Appeals. Reference is here made to that statement, appearing on page 19, *infra*, Appendix A. See also the statement of the facts

appearing in the opinion of the trial court at page 26, *infra*, Appendix B.

## REASONS FOR GRANTING THE WRIT

The court below decided an important question of law that has not been, but that ought to be, decided by this Court. The holding directly conflicts with *United States* v. *Patteson*, 10th Cir., No. 5123, January 19, 1956. The opinion of the Tenth Circuit in that case is attached hereto.—See Appendix F, *infra*, pages 39 to 43. Importance of the substantial question and the conflict give this Court jurisdiction under Rule 19 (b) of the Rules of this Court. The importance and substantiality of the question shall now be shown.

The prosecutions involved nonfeasance or a refusal to act, which is a violation of the law. The question is of great importance to the Government, trial judges, lawyers representing such persons accused of such offenses, the persons charged and all other persons who may be concerned with the refusal to comply with an administrative order.

At the present time the Department of Justice has in abeyance, awaiting a final determination as to what court has jurisdiction, scores, if not hundreds, of prosecutions of conscientious objectors who have refused to report for civilian work. District attorneys in many parts of the United States are awaiting a final determination of the question so that they will know which court has jurisdiction, the district court where the board is located and where the order was defied or the district court located where the place of work should have been performed, but where it was not performed as ordered by the local board, is located.

A late bulletin of the National Headquarters of the Selective Service System, entitled "Selective Service" (Washington, D. C., January 1956, Vol. VI, No. 1), shows that there are 1,457 persons classified as conscientious objectors who have been physically examined and 3,700

who have not been examined. Of this number of several thousand a large number of cases involve persons who have refused to report for civilian work. Several hundred cases ultimately will be in the district courts. In each of these cases there is involved the question as to what court has jurisdiction.

The district courts have disagreed as to jurisdiction. (*United States* v. *Sutter*, S. D. Cal., 127 F. Supp. (1954); *United States* v. *Johnston and Sokol*, E. D. Pa., 131 F. Supp. 955 (1955); *United States* v. *Chiarito*, D. Or., 69 F. Supp. 317 (1946); *United States* v. *Patteson*, D. Kans., No. 9391, May 16, 1955), affirmed on appeal, 10th Cir., No. 5193, January 19, 1956, Appendix F, pp. 39-43, *infra*.

The decision of the court below ignores completely *Falbo* v. *United States*, 320 U. S. 549 (1944); *Billings* v. *Truesdell*, 321 U. S. 542 (1944); *Estep* v. *United States*, 327 U. S. 114 (1946). The court was blind to the offense of refusal to comply with the draft board orders, which took place initially in the Western District of Pennsylvania. This serious oversight was produced by the court's looking at the last step in the stairway of connected steps instead of the next step. The court below took one long step from the top step down to the bottom instead of going down the stairs, step by step, through the connected series of steps fixed by the Selective Service Regulations.

Section 12 (a) of the act (50 U. S. C. App. § 462 (a)) provides that any person—

> "... charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) defines the appropriate civilian work that may be done by a conscientious objector. 32 C. F. R. § 1660.20 (a) provides for the conscientious objector to submit three types of civilian work to the local board, from which it is to determine one that is appropriate. 32 C. F. R. § 1660.20 (b) provides for the local board to submit three types of civilian work to the registrant in the event the registrant fails to submit three types of work that he offers to perform or if the local board is not satisfied with the three types of work he submits to it. C. F. R. § 1660.20 (c) provides for a hearing before the board attended by a representative of the state director and the registrant, for the purpose of reaching an agreement in the event the registrant and the board have not theretofore agreed upon the type of work to be done. 32 C. F. R. § 1660.20 (d) provides for the local board, upon approval of the Director of Selective Service, to order the registrant to perform civilian work.

32 C. F. R. § 1660.21 (a) provides that no registrant shall be ordered to perform civilian work "in the community in which he resides" unless the local board finds it is "desirable in the national interest."

32 C. F. R. § 1660.30 provides as follows:

> *"Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a deter-

mination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

The significance of the difference between failing to report for work at the place assigned and reporting there and thereafter refusing to perform the work is emphasized in 32 C. F. R. § 1660.31 (a). If a registrant is ordered to do work at a hospital but refuses to report for work, then his local board file remains under the jurisdiction of the local board and the state director of the state where the local board is located. Should the conscientious objector report at the hospital to perform the work, then the file is transferred to the state director of the state where the place of performance of the civilian work is located.

Had petitioners resided, and the boards been located, in a state other than Pennsylvania, then the files would never have been under the jurisdiction of the Pennsylvania State Director. The reason the State Director of Pennsylvania had jurisdiction of the files was that petitioners resided in the State of Pennsylvania and the boards were located there. The State Director of Pennsylvania did not get jurisdiction of the files by reason of petitioners reporting at the state hospital to do the work.

In *Dodez* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to go to a civilian public service camp at Medaryville, Indiana. His local board was located in Ohio. He wrote the local board stating he would not report as ordered. He failed to report. He was prosecuted in the Northern District of Ohio, and not in Indiana.

In *Gibson* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to report to a civilian public service camp in South Dakota. He registered with a local board at Eldorado, Arkansas. After reporting at the camp in South Dakota he departed without leave. He was indicted and prosecuted in the District of South Dakota.

In *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), it was held that, when a registrant reported at

his local board and stated his refusal to proceed to a civilian public service camp to perform work of national importance, the registrant committed the offense of failing to report to his board to do work of national importance. In that case the defendant registered with his local board in Scott City, Kansas. He was thereafter ordered by the local board to report for work of national importance and proceed to the civilian public service camp at Lapine, Oregon. The defendant was indicted, prosecuted and convicted in the District of Kansas. His conviction was affirmed by the Court of Appeals, which constituted an implied finding that the District of Kansas had jurisdiction of the offense.

The statute, the regulations and the above-cited cases show that there are separate offenses. There is the offense of failing to report for civilian work. This offense is committed even though the registrant appears at the local board and states his determination not to perform the civilian work. There is the additional and separate offense of refusing to perform civilian work after having reported for such work at the place where it was ordered to be performed. Where the registrant fails to proceed to the place of performance of such work he has committed an offense of failing to report for such work. The offense is obviously committed in the district where his local board is located, and where he refuses to go farther.

The other offense is committed at the place where the civilian work is ordered to be performed. This is committed where the registrant reports for work but thereafter refuses to perform the work. This offense is committed in the district where the place of work is located.

The two offenses are distinct and separate. The federal district court where the board is located has no jurisdiction over the offense of refusing to perform civilian work where the registrant has reported at the place of work and refused to do the work, as in the case of the defendant in *Gibson v. United States*, 329 U. S. 338 (1946). The district court where the place of work is located has no jurisdiction over

the offense where a registrant reported to the local board or did not proceed to the place of work, as in the cases of *Dodez* v. *United States*, 329 U. S. 338 (1946), and *Jeffries* v. *United States*, 169 F. 2d 86 (10th Cir. 1947).

If each petitioner in these cases had been ordered to report for induction into the armed forces and refused to report for induction there would be no doubt that jurisdiction would be fixed in the United States District Court for the Western District of Pennsylvania. Had each petitioner been ordered to report for induction in Philadelphia and reported at such induction center and then refused to submit to induction, there would be no doubt that the United States District Court for the Eastern District of Pennsylvania would have jurisdiction. Had each petitioner been ordered under the 1940 Act (50 U. S. C. App. §§ 301-318) to report to his local board and to do work of national importance in a civilian public service camp in the Eastern District of Pennsylvania, and thereafter failed to proceed to such civilian public service camp, there would be no doubt that jurisdiction would be in the United States District Court for the Western District of Pennsylvania. (*Dodez* v. *United States*, 329 U. S. 338 (1946)) But assume that they had proceeded to the civilian public service camp in the Eastern District of Pennsylvania, and there refused to perform the work, and were indicted therefor, then there would be no doubt that the Eastern District of Pennsylvania would have jurisdiction.—*Gibson* v. *United States*, 329 U. S. 338 (1946).

In the opinion written by Judge Goodrich in these cases, *infra*, p. 19, the court below likened the refusal to comply with the draft board order to the familiar illustration made in venue cases of shooting across a state line and killing a person in the adjoining state. The court below also simulated the refusal to comply with the draft board order to cases of publication of libelous words in more than one jurisdiction, false representation by means of mail delivered in another state, shipment of impure foods from one state

to another and a solicitation in one state by a person made to an employee in another state to violate his official duties.

These illustrations relied on by the court below in these cases and claimed to be analogous are not at all analogous. They are obviously distinguishable. The acts were *affirmative* acts. They involved offenses of misfeasance and malfeasance passing from one jurisdiction to another. They did not involve the distinctly different situation here, which is a refusal to act, or nonaction. The case here involves no overt act committed in one district that extends into another.

The analogy drawn by Judge Goodrich turns to the nonaction of each petitioner's refusing to comply with the draft board order. It is likened to the refusal and failure of a person to file reports and returns in different administrative agencies. The court below also likens the nonaction of the registrants to a refusal to comply with an order to appear before a legislative committee. All the instances relied on by the court below in these cases are not in point. They involved orders issued by the tribunals located in the district where the prosecutions were brought. But these cases do not involve orders issued by tribunals in the district where the prosecution was brought. The cases relied on in the opinion of the court below in these cases do not support the conclusion reached. They are also patently distinguishable. The tribunals issuing the orders in these cases were located in a district other than that where the prosecution was brought. It is the source of the authority or the order that determines the place of violation of the law or the place of the offense. Since all the cases relied on in these cases involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district, as in these cases, such cases are, upon their face, not in point and do not support, in any sense of the word, the conclusion reached by the court below in these cases.

The only two cases relied on by the court below in its

opinion that are seemingly in point are *State* v. *Peabody*, 25 R. I. 544, 56 A. 1028 (1904), and *State* v. *Yocum*, 182 Ind. 478, 106 N. E. 705 (1914). (See footnote 14 of the slip opinion.) But these two cases are not in point. They involve the failure to support children contrary to law. It may seem that these two cases are analogous to the refusal to comply with the local board order. But they are distinguishable. In those cases there was involved the liability to support children, which followed the children wherever they went in the state. It was a transitory obligation. The obligation here is not transitory. The orders were issued in the Western District of Pennsylvania. The refusal to comply with the order issued in the Western District of Pennsylvania is the basis for the offense in each case. The obligation began in the Western District of Pennsylvania and the order was breached in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. But assuming that the *Peabody* and *Yocum* cases are in point, then these two cases relied upon by the court below in its opinion are challenged as being erroneous. Neither the *Peabody* nor the *Yocum* case dealt with the Sixth Amendment. Indeed the courts did not discuss the constitutional right of the defendants to be tried in the district where the offense was committed. The courts merely dealt with a common law question of venue. The courts did not have to consider the basic question of the lack of jurisdiction resulting from the mandate of the Sixth Amendment, relied upon by the petitioners here.

The court below, therefore, fatally erred when it relied on the *Peabody* and *Yocum* cases as authority for the conclusion it reached in these cases. Judge Goodrich said (*infra*, p. 23): "We think what is being prosecuted here is the failure of these defendants to do what the law required them to do." This statement is proper, but the court below circumnavigates the next question and leaves a vacuum by concluding that the refusal took place at the hospital. But the refusal in these cases did not take

place at the hospital. The refusal there took place in the Western District of Pennsylvania, where the orders were given. Here the petitioners refused to comply with the orders in—and only in—the Western District of Pennsylvania. They did not violate any order at the hospital in the Eastern District of Pennsylvania. There was no refusal to obey any order there.

In footnote 13 of its opinion, *infra*, p. 22, the court below cites the English case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846), which is also cited in *United States* v. *Anderson*, 328 U. S. 699, 705 (footnote 14). The offense there was failure to appear before the district court in Birmingham that had issued the order. This case is analogous to failure to appear before a local board that had issued the order. It is identical with the factual situation here. The failure to appear before a local board to proceed to perform the civilian work, as was held in *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), is the offense committed, and the offense was committed in the case at bar in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania.

The case of *New York Central & H. R. R. Co.* v. *United States*, 2d Cir., 166 F. 267 (1908), cited in footnote 18, is likewise not in point. The failure to file a document at a place fixed by statute is the same as failure to report before the local board for the performance of civilian work and not the failure to report at the place where the work is located.

*United States* v. *Van Den Berg*, 7th Cir., 139 F. 2d 654 (1944), relied upon in footnote 20, *infra*, p. 23, is not in point. The holding in that case supports the position taken by petitioners here, that jurisdiction is to be determined by the place where the order is given. In that case the local board was located in the Eastern District of Wisconsin, and the defendant was registered in the Eastern District of Wisconsin. There the court held that the Eastern District had jurisdiction and such holding is directly in

point. The other cases cited in footnote 20 are the same factually and also do not support the Court's conclusion.

But in the same footnote and not cited as authority for the holding by the court below is the case of *United States* v. *Chiarito,* 69 F. Supp. 317 (D. Or. 1946). That case is directly in point here and is more in consonance with justice, fair play and the spirit of the Sixth Amendment. The opinion was written by Judge James Alger Fee, who is now a member of the United States Court of Appeals for the Ninth Circuit.

One cannot help but be persuaded that the reasoning in the *Chiarito* case is basically more sound than the opinion of the court below in these cases. The reasoning of Judge Fee is cogent. This Court should consider what Judge Fee has to say on this question (69 F. Supp. at pages 321-325). This Court should adopt *United States* v. *Chiarito,* 69 F. Supp. 317, and set aside the decision in these cases.

There is no difference whatever between the offense of failing to report for civilian work under the Universal Military Training and Service Act and the offense of failing to report for civilian work of national importance under the 1940 Act (50 U. S. C. App. §§ 301-318). The offense is committed under each act by the failure to report at the place of work and enter upon the performance of such civilian work. The offense of leaving a civilian public service camp under the 1940 Act is the same as the offense of leaving a place of civilian employment under the present Act (50 U. S. C. App. §§ 451, *et seq.*). Under both acts the jurisdiction of the district court is to be determined by the place of the offense. Under both acts the place of the offense of failing to report for work is in the district where the local board is located. Under both acts the jurisdiction of the offense of leaving civilian work is in the place where such work is ordered to be performed.

Since the district court where the board is located has jurisdiction of the offense of failing to report for induc-

tion, when the registrant fails to proceed to the induction center, then, by force of the same reason, the same court would have jurisdiction over the failure of a registrant classified as a conscientious objector to proceed to the place of work. The offense is identical in each case. It is committed in the same district, namely, the place where the order to report was given.

To emphasize the error of the opinion by the court below, consider the following: Under the law a conscientious objector can be ordered to do work outside the continental United States and its possessions. The conscientious objector may be sent anywhere in the world a soldier can be sent. He may be ordered to perform alternate civilian work any place in the world. Assume now that the conscientious objector is ordered to do civilian work in lieu of induction in Korea. Then, under the reasoning of the court below the only federal court in the United States or its possessions that would have jurisdiction to prosecute, in the event he refused to report for and perform the civilian work, would be the district where he was found —which in these cases is the Western District of Pennsylvania. Certainly the law is not so unreasonable, impossible and ineffective as a logical extension of the doctrine in the opinion below makes it. This analogy shows the fundamental error that underlies the decision of the court below.

It is unreasonable and unfair and imposes a harsh burden upon the defendant to give jurisdiction to the district court where the offense was not committed. It is not the location of the place of work that counts, any more than the location of the place where a registrant is ordered to submit to induction would be determinative, if he did not report at such place for induction. It it the place where the offense was committed that gives jurisdiction to the court. In all cases where the registrant reports to the local board, and then refuses to go any farther, or declines even to report, either to a place where he is ordered to perform

civilian work or to a place where he is ordered to submit to induction, the offense is still committed at the place where the local board that issued the order is located.

The Sixth Amendment to the Constitution requires that defendants in criminal cases be tried in the district wherein the crimes were committed. Petitioners submit that the *locus delicti* of the alleged crimes is in the Western District of Pennsylvania. The above analysis of the nature of the crime and its constituent elements fully discloses this.

The position that the petitioners take here is supported by *United States* v. *Johnson*, 323 U. S. 273 (1944). In that case the defendant was indicted for violating the Federal Denture Act (18 U. S. C. A. §§ 420 (f)—420 (h)). The information was filed in the District of Delaware and charged the defendant with depositing in the mails at Chicago for delivery in Delaware certain dentures, in violation of the Delaware laws, contrary to the Federal Denture Act. The information was quashed on the ground that the defendant could be prosecuted only where the dentures were deposited in the mails. The court pointed out that, in the absence of specific venue provisions giving the Government a choice of trial, the place of trial should be fixed to be consistent with "the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."—323 U. S. at page 276.

The Court also pointed out that, where a defendant is prosecuted in a place other than that of his residence or the place of commission of the offense, he would be subjected to "serious hardship of defending prosecutions in places remote from home." The Court said that such practice of allowing the Government to select places of prosecution remote from the place where witnesses are located gives rise to the "temptation to abuses, already referred to, in the administration of criminal justice." (323 U. S. at page 276.) The attention of the Court is directed also to the

concurring opinion of Mr. Justice Murphy in that case (323 U. S. at page 279).

The harshness and the injustice that a defendant in a criminal case will be subjected to are unlimited if the position taken by the court below in these cases is correct. A local board on the eastern coast of the United States could order a registrant living in the eastern states to report for civilian work on the west coast or in Hawaii or Alaska. He could then be prosecuted in those remote places where he had never gone. The Government would be in position to transport its witnesses all the way across the continent or to any other place, but the defendant—in most if not in all cases—would be absolutely deprived of witnesses to corroborate his defenses or prove his good character.

If the Government is given such power in cases such as these, then there will be an end to many possible defenses that a conscientious objector might have under the law. It is significant that, in cases where a registrant is ordered to report for induction at a place too distant for his convenience, he may have the order to report for induction changed and transferred to a place nearer and more convenient to him. (32 C. F. R. § 1632.9) This regulation makes it impossible for a registrant who is ordered to report for induction into the armed forces to be mistreated and denied the right of trial in a district court convenient to him. Also, the registrant classified as a conscientious objector is entitled to be tried in the district court where the board is located, and may not be tried in some faraway place where he has never traveled, because, under the Regulations, he has exhausted his administrative remedies upon the taking of the physical examination and his appeal. He is not required to respond and travel to the place where the civilian work is to be performed in order to exhaust his remedies.—*Dodez* v. *United States*, 329 U. S. 338 (1946).

The court below would go a step farther and force the

jurisdiction of the court in *Gibson* v. *United States*, 329 U. S. 338 (1946), upon a registrant, who refuses to go so far as Gibson went, but who desires to rest on his rights and defend, as did the registrant in *Dodez* v. *United States*, 329 U. S. 338 (1946). The Government should be given no such weapon of hardship and inconvenience to be used at its discretion in the prosecution of persons classified as conscientious objectors and ordered to do civilian work at places far distant from their residences and the location of the local board as the court below has handed to it contrary to the intent of the authors of the Sixth Amendment.

## CONCLUSION

For the reasons above stated it is respectfully submitted that this joint petition for writ of certiorari should be granted.

HAYDEN C. COVINGTON

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Brooklyn 1, New York

*Counsel for Petitioners*

January, 1956.

## APPENDIX A

### Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 11,620

---

UNITED STATES OF AMERICA,

*Appellant*

*v.*

PAUL DEEMER JOHNSTON

---

No. 11,621

---

UNITED STATES OF AMERICA,

*Appellant*

*v.*

JOHN SOKOL

---

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

---

Argued November 2, 1955

Before GOODRICH, STALEY and HASTIE, *Circuit Judges.*

---

## OPINION OF THE COURT

(Filed December 1, 1955)

By GOODRICH, *Circuit Judge.*

These two cases raise the question of the proper venue in a prosecution for disobedience of the provisions of the Universal Military Training and Service Act.[1] The facts are simple and undisputed. The two defendants registered in accordance with the draft law and were classified I-O. Each was directed by his local board to appear before the board to be assigned to "Civilian work contributing to the maintenance of the national health, safety, or interest . . ."[2] Each appeared before his local board in accordance with the instructions received in SSS Form No. 153. Sokol was assigned to hospital work at Philadelphia State Hospital, Philadelphia, Pennsylvania, and Johnston to the Norristown State Hospital, Norristown, Pennsylvania. Both hospitals are located in the eastern district of Pennsylvania. Each told his local board that he would not obey the order of assignment and each never entered the eastern district to do the work assigned. Both at all times resided in the western district of Pennsylvania and their local boards were located in this district. Both registrants were indicted in the eastern district of Pennsylvania. The district court dismissed each indictment for lack of "venue-jurisdiction."[3]

Our first problem is to find out just what offense these men are charged with. The indictments each refer to title 50 U. S. C. App. sections 456 and 452. The Sokol indictment refers more particularly to section 456(j). The references to these two sections of the statue appear both at the head and in the body of the indictments. Section 456(j) has as its subject matter the treatment of those who by reason of religious training and belief are conscientiously opposed to participation in war. Provision is made for the manner

[1] 62 STAT. 604 (1948), *as amended*, 50 U. S. C. App. § 451-473 (1952).
[2] 65 STAT. 86 (1951), 50 U. S. C. App. § 456(j) (1952).
[3] United States v. Johnston, 131 F. Supp. 955 (E. D. Pa. 1955).

in which this claim shall be presented. There appears in the section the authorization to the board to assign a registrant found to be conscientiously opposed even to noncombatant service to work of national importance. It states that one who "knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."[4]

In section 462 (section 12 of the act) the conduct which is, among others, subject to sanction, is in any manner to "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . ."[5]

It will be noted that paragraph (j) above quoted carries the words "fails or neglects." Section 462 adds the word "refuses." Did these registrants "refuse" to obey orders in the western district in such way as to make them responsible for violation of the statute under section 462? It is agreed that they there stated to their respective boards that they were not going to obey their assignment for service. We do not need to answer the question just stated because the defendants are not being prosecuted in the western district for their defiance of the board. They are indicted, instead, in the eastern district. It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district. Do the indictments charge this offense?

As to Sokol the answer is clear. He was indicted for neglecting "to perform a duty . . . in that he failed to report to the . . ." assigned hospital. Johnston, on the other hand, was charged with neglecting "to perform a duty . . . in that he failed and refused to obey an order . . . directing him to report . . ." at the place of assignment. As we construe this indictment, it charges Johnston with,

[4] 65 Stat. 86 (1951), 50 U. S. C. App. § 456(j) (1952).
[5] 62 Stat. 622 (1948), 50 U. S. C. App. § 462(a) (1952).

among other things, failing to report to the specified hospital as ordered. That part of the indictment which charges him with possible offenses other than failing to report can be disregarded as as surplusage.[6]

It is apparent that the failure to report to the place of assignment is an indictable offense under the act. Section 462 makes it an offense to fail to perform a duty imposed by authority of the statute. Section 456(j) poses no obstacles. Indeed it raises the board's order to report to the level of a duty under section 462, at least to the extent that "failure" or "neglect" to obey the order is considered to be a violation of such a duty. On the other hand, we do not believe that the Sokol indictment is inadequate in that the board's order is not mentioned. The duty it created is. But where is the offense of failure to report consummated?

Now we have reached the interesting substantive question of criminal law. It is well established that one does not have to be physically present in a state to be guilty of a criminal offense there. The standard illustration, familiar to every law student, is that of shooting across a state boundary line and hitting a victim in the second state. The offense is complete where the fatal force hits the victim and the defendant may be prosecuted for homicide there if jurisdiction can be obtained over his person.[7] The same theory has been applied in both torts and crimes with regard to dissemination of defamatory words,[8] the loss sustained to one relies upon false representations given to him by another from another state,[9] the injury resulting

[6] *Cf.* Ford v. United States, 273 U. S. 593, 602 (1927).

[7] State v. Hall, 114 N. C. 909, 19 S. E. 602 (1894); United States v. Davis, 25 Fed. Cas. 786, No. 14,932 (1st Cir., 1837); see also RESTATEMENT, CONFLICT OF LAWS, Note § 377, ill. 1 at 456 (1934) (same principle applicable in torts).

[8] *Torts:* RESTATEMENT, CONFLICT OF LAWS, Note § 377, ill. 7 at 457 (1934). *Crimes:* Sachs v. Government of the Canal Zone, 176 F. 2d 292, 297 (5th Cir. 1949); State v. Piver, 74 Wash. 96, 132 P. 858 (1913).

[9] *Torts:* RESTATEMENT, CONFLICT OF LAW, Note § 377, ill. 5, 6 at 457 (1934). *Crimes:* Updike v. People, 92 Col. 125, 18 P. 2d 472 (1933); State v. Devot, 66 Utah 319, 242 P. 395 (1925); *but see* Commonwealth v. Schmunk, 22 Pa. Sup. 348 (1903), *affirmed*, 207 Pa. 544, 56 A. 1088 (1904). The conflict in the crimes cases stems from the fact that the

when canned food imported and distributed from one state causes harm in another,[10] and the attempt by letter mailed in one state to induce a public employee in another to violate his official duties.[11]

These defendants, however, did no act nor did they follow any course of conduct in the eastern district of Pennsylvania. What is being complained of is their failure to do, not what they did. This case raises the point left unanswered in *United States v. Anderson*, 328 U. S. 699, 706 (1946). But we think the answer is pretty clear on the basis of established legal rules applicable to other cases of omissions which have been made crimes. It is true, and no one disputes, that the Constitution (Sixth Amendment) requires that a person shall be tried in a district where the crime shall have been committed.[12] But it is also clear that where there is a legal duty to act and the failure to do that act is a criminal offense, the courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him. This is illustrated by a variety of decisions in different fact situations. Here are some of the instances: the failure of an individual doing business in one county to surrender himself at a district court in another in response to a fiat in bankruptcy,[13] the neglect of a father residing in one county to support his children residing in another,[14] the failure of a witness to appear before a legislative committee in obedience to a summons,[15] the failure to file necessary reports

substantive offense requires proof of the receipt, and not merely the loss, of property.

[10] *Torts:* Hunter v. Derby Foods, Inc., 110 F. 2d 970 (2nd Cir. 1940).

[11] *Crimes:* In re Palliser, 136 U. S. 257 (1890). Referring to U. S. CONST. art III, § 2, cl. 3 and U. S. CONST. amend. VI, the Court said that "the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" (*Id.* at 265).

[12] *Ibid.*

[13] Regina v. Milner, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846).

[14] State v. Peabody, 25 R. I. 544, 56 A. 1028 (1904); State v. Yocum, 182 Ind. 478, 106 N. E. 105 (1914).

[15] State v. Brewster, 87 N. J. L. 75, 93 A. 189 (1915).

with the appropriate governmental authorities in the District of Columbia concerning (1) the custody of enemy property and the indebtedness of alien enemies,[16] (2) an alien woman[17] and (3) rates and charges of a railroad,[18] and the failure to file tax returns with the Collector in the appropriate internal revenue district.[19]

We see no reason why this well established line of authority should not be applied in these selective service cases. We think what is being prosecuted here is the failure of these defendants to do what the law required them to do. Suppose these young men, after defying the local board in their respective communities, had within the period allotted for travel changed their minds and reported for their hospital duty at the places assigned on the given day. There certainly would be no offense of failure to report committed. Whether a crime or not, the prior refusal would not prevent compliance. Likewise in the case before us the prior refusal was neither the failure to report nor did it preclude the possibility of committing this offense. We think it clear that here this offense was committed at the time and place the act should have been performed. Such a view has been expressed by federal courts applying the draft law.[20]

There is one further point which has to do with the Criminal Appeals Act, 18 U. S. C. § 3731 (1952). By that statute an appeal may be taken on behalf of the United

[16] Rumely v. McCarthy, 250 U. S. 283 (1919).

[17] United States v. Lombardo, 241 U. S. 73 (1916).

[18] New York Cent. & H. R. R. Co. v. United States, 166 F. 267 (2nd Cir. 1908).

[19] Bowles v. United States, 73 F. 2d 772, 774 (4th Cir. 1934), *cert. denied*, 294 U. S. 710 (1935); United States v. Commerford, 64 F. 2d 28, 32 (2nd Cir.), *cert. denied*, 289 U. S. 759 (1933).

[20] United States v. Van Den Berg, 139 F. 2d 654, 656 (7th Cir. 1944); Humes v. Pescor, 148 F. 2d 127, 128 (8th Cir. 1945); Jones v. Pescor, 169 F. 2d 853, 855 (8th Cir. 1948); United States v. Sutter, 127 F. Supp. 109, 115 (S. D. Cal. 1954); *contra* United States v. Patteson, 132 F. Supp. 67 (D. Kan. 1955); United States v. Chiarito, 69 F. Supp. 317, 322 (D. Ore. 1946) (alternative holding). Penor v. United States, 167 F. 2d 533 (9th Cir. 1948), is not in point. There the crime charged was desertion of the original camp rather than failure to report to the one newly assigned.

States to the Supreme Court of the United States from a judgment of a district court dismissing an indictment where the judgment "is based upon the invalidity or construction of the statute upon which the indictment . . . is founded." By the same section of the code an appeal may be taken by the United States to a court of appeals from a judgment of a district court setting aside or dismissing any indictment "except where a direct appeal to the Supreme Court of the United States is provided . . ." Under the statute, then, we do not have authority to hear the appeal if it is one which is appealable directly to the Supreme Court.

In *United States v. Jones*, 345 U. S. 377 (1953), the Court sent back to a court of appeals a case where appeal had been taken directly to the Supreme Court and where, in the view of that Court, there was a question of examining and construing the information. This the Supreme Court said was not properly a question for it but for the court of appeals instead. We think that case governs this. As set out above, there is a question of construing the indictments in this case to see what is being charged. And the only statutory question is whether such charges can be brought under the act, a question primarily involving the adequacy of the indictment rather than the construction of the statute. The case is, therefore, a proper one for consideration at this level and this consideration we have endeavored to give it.

The judgment of the district court will be reversed and the case remanded.

## APPENDIX B

### Opinion

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 17,804

United States of America

v.

Paul Deemer Johnston

Criminal No. 17,879

United States of America

v.

John Sokol

IX.

OPINION

(Filed March 17, 1955)

Ganey, J. March 17, 1955

Each of the defendant's motion to dismiss the indictment against him raises the troublesome question of venue-jurisdiction. Defendants were indicted for knowingly neglecting to perform a duty imposed upon them pursuant

to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. A. Appendix, § 451 et seq.

The defendant, Paul Deemer Johnston, resided in the Western District of Pennsylvania. He registered under the Act with his local draft board in that district, and throughout his selective proceedings he dealt only with selective service personnel there. He was finally given a I-O classification as a conscientious objector, which entitled him to perform two years of civilian work contributing to the national health in lieu of his being inducted into the armed forces. Subsequently the local board, in accordance with Selective Service regulations, notified him by mail in the western judicial district of Pennsylvania to report to it for the assignment of civilian work. He was instructed to report to the Norristown State Hospital located in the Eastern District of Pennsylvania, the judicial district of this court, on November 30, 1953. At the time of the assignment, he personally notified the board of his refusal to accept such employment. He has not entered this district to report for the assigned work.

The story of the other defendant, John Sokol, is parallel to that of defendant Johnston.

On the assumption that when the omission to perform a duty constitutes a crime, the venue is in the judicial district in which the duty should have been performed, the Government indicted the defendants in this district.[1]

Our problem, as in United States v. Anderson, 328 U. S. 699, 705 (1946), is to ascertain what duty it was, the failure to perform, that constituted the crime, and what acts of the defendants constituted the violation in order to determine where the crime was committed.

Clearly the duty in each case was to report to the State hospital, the place of performance, in this judicial district. However we think the violation was the defend-

[1] Cf: Fe tnote 14 on page 705 of United States v. Anderson, 328 U. S. 699 (1946).

ants' refusal to report to the place of performance. The refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present.[2] Penor v. United States, 9th Cir. 1948, 167 F. 2d 553, 555; United States v. Chiarito, D. C. Ore. 1946, 69 F. Supp. 317, 322-325.

Accordingly, the defendant's motion in each case to dismiss the indictment will be allowed for lack of jurisdiction.

[2] See footnote 11 on page 704 of United States v. Anderson, 328 U. S. 699, in which the Court pointed out that "the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, 'venue is in the district where the subject was ordered to report', *apparently without regard to whether he had been present physically there.*" (Italics supplied.)

## APPENDIX C

### Judgment—Johnston Case

### UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 11,620

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL DEEMER JOHNSTON

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and HASTIE, Circuit Judges.

### JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

IDA O. CRESKOFF
Clerk

December 1, 1955

**Judgment—Sokol Case**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,621

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN SOKOL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

IDA O. CRESKOFF
Clerk

December 1, 1955

## APPENDIX B

### Sur Petition for Rehearing

### UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 11,620

UNITED STATES OF AMERICA,

Appellant

vs.

PAUL DEEMER JOHNSTON

---

No. 11,621

UNITED STATES OF AMERICA,

Appellant

vs.

JOHN SOKOL

---

### SUR PETITION FOR REHEARING

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT

[signed] Goodrich
HERBERT F. GOODRICH

Dated:

January 4, 1956

# APPENDIX E

## Selective Service Material

### Universal Military Training and Service Act, as Amended

### Title I

#### *Section 6 (j) of the Act*

Section 6 (j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant

training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

*Section 12 (a) of the Act*

Section 12 (a) of the act (50 U. S. C. App. § 462 (a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

*Section 1660.1 of the Regulations*

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when

such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

*Section 1660.20 of the Regulations*

Section 1660.20 of the Selective Service Regulations (32 C. F. R. § 1660.20) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

*"Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work.*—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by

the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which

should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

*Section 1660.30 of the Regulations*

Section 1660.30 of the Selective Service Regulations (32 C. F. R. § 1660.30) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides as follows:

"*Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

*Section 1660.31 of the Regulations*

Section 1660.31 of the Selective Service Regulations (32 C. F. R. § 1660.31) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952, except as otherwise noted) provides as follows:

"*Administration of Registrants While Performing Civilian Work.*—(a) After a registrant who has been clas-

sified in Class I-O reports in response to an order from his local board for civilian work in lieu of induction and he has been classified in Class I-W, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the State Director of Selective Service for the State in which the work is being performed. It shall be the responsibility of such State Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provision of section 1660.21. When the registrant has satisfactorily completed this work, the State Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the State Director of Selective Service, the State Director of Selective Service shall forward the cover sheet to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

(b) When the civilian work to which a registrant is ordered by the local board in lieu of induction is to be performed at any place outside of the continental limits of the United States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, Guam, and the Canal Zone, and the registrant has reported for such work, the local board, after classifying the registrant in Class I-W, shall forward the registrant's Cover Sheet (SSS Form No. 101) and contents to the Director of Selective Service. It shall be the responsibility of the Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released

under the provisions of § 1660.21. When the registrant has satisfactorily completed this work, the Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the Director of Selective Service, the Director of Selective Service shall determine whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(c) When the local board receives the cover sheet of the registrant from the Director of Selective Service or the State Director of Selective Service together with the letter stating that the registrant has satisfactorily completed his period of civilian work or a written notification that the registrant has been sooner released from such work by the Director of Selective Service under the provisions of § 1660.21, the local board shall mail the registrant a certificate evidencing his satisfactory completion of and release from civilian work and shall retain him in Class I-W and identify him on all records by following his classification with the abbreviation 'Rel.' until such time as he attains an age beyond the maximum age of liability for military service."

[Paragraph (c) amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952]

## APPENDIX F

## UNITED STATES COURT OF APPEALS

### TENTH CIRCUIT

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No. 5193 - NOVEMBER TERM, 1955

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UNITED STATES OF AMERICA,
Appellant,

v.

DUDLEY A. PATTESON,
Appellee.

Appeal from the United States District Court for the District of Kansas.

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Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for appellant.

Hayden C. Covington, for appellee.

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Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge.

The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Training and Service Act. (50 U. S. C. A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-O.

This classification is one designated for those who are conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces of the United States. 50 U. S. C. A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for th District of Kansas for violation of 50 U. S. C. A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (50 U. S. C. A. Sec. 462(a)) provides that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, *** shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amendment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, *** ." The question narrows itself to that of where was the crime committed.

The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[1] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though the person charged was not physically present in that district at the time of the omission or failure. The Third Circuit in United States v. Johnston, — F. 2d. —, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an act of omission or an offense of misfeasance or malfeasance which would pass from one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U. S. 699, "The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all my [sic] be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (footnotes omitted).

[1] See Rumely v. McCarthy, 250 U. S. 283; United States v. Lombardo, 241 U. S. 73; United States v. Commerford, 2 Cir., 64 F. 2d. 28, cert. den. 289 U. S. 759; N. Y. Central and H. R. R. Co. v. United States, 2 Cir., 186 F. 2d. 267; State v. Peabody, 25 R. I. 54, 56 Atl. 1028.

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions. Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U. S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U. S. 338; Billings v. Truesdale, supra; Falbo v. United States, 320 U. S. 549; Hudson v. United States, 10 Cir., 157 F. 2d 782, cert. den. 329 U. S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F. 2d. 298, cert. den. 325 U. S. 868; Berman v. United States, 9 Cir., 156 F. 2d. 377, cert. den. 329 U. S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v. United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U. S. 338; and Jeffries v. United States, 10 Cir., 169 F. 2d. 86, prosecutions were had in the district where the board was located when the registrants refused to report for work of national

importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[2]

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U. S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

[2] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a noncompliance with the order as if he had not appeared at the office of the Local Board."